National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 31, 1997

TO: Paul Eggert, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Teamsters Local 174 (Burlington, Northern & Santa Fe Railway Co.), Case 19-CC-19530

220-5042, 560-7520-7500, 560-7540-0150, 560-7540-202, 560-7540-2060

This case was submitted for advice regarding whether the Union violated Section 8(b)(4)(ii)(B) by threatening to picket a non-statutory Employer unless it signs a no-subcontracting agreement that proscribes the Employer's use of non-union subcontractors in the future.

FACTS

Burlington Northern and Santa Fe Railway Company ("Employer") is an interstate railroad carrier subject to the Railway Labor Act ("RLA").[(1)] For the last several years the Employer contracted with Eagle Systems ("Eagle") to load and unload trailers and containers at the Employer's intermodal hub in Seattle, Washington. Eagle employees were represented by Teamsters Local 174 ("Union"). On June 9, 1997, the Employer terminated its contract with Eagle and contracted with Parsec Inc. ("Parsec"), a nonunion Section 2(2) employer. The Employer has no contractual relationship with the Union and none of its employees are represented by the Union.

In May, the Union had asked the Employer to arrange a meeting between the Union and Parsec in order to encourage Parsec to hire former Eagle employees. The Employer refused, and the Union abandoned its efforts. Instead, on June 17, the Union requested in writing that the Employer sign an agreement that in the future the Employer would only contract with Union signatory subcontractors. The Union expressly disavowed any intent to interfere with existing subcontracts.[(2)] In support of its demand the Union threatened to picket the Employer.

The Employer then filed the instant ULP charge alleging a violation of Sections 8(b)(4)(A) and (B). On June 26, the Employer also filed a complaint and request for a temporary restraining order ("TRO") pursuant to the RLA against the Union and two Union officials in federal district court.[(3)] At the TRO hearing on July 7, the parties stipulated to maintain the status quo, including no Union picketing, until August 8, when the court would hold a hearing on whether to issue a preliminary injunction.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the instant Section 8(b)(4)(B) charge.[(4)] Initially we note that the Employer's RLA status does not deprive the Board of jurisdiction over a Section 8(b)(4)(B) charge.[(5)] For purposes of Section 8(b)(4)(B), the Employer clearly is a neutral party to the Union's dispute with the nonunion subcontractors whose employees it seeks to represent.[(6)]

However, in construing Section 8(b)(4)(B), the Supreme Court and the Board have distinguished between cease-doing-business agreements that require an immediate cessation of business with an existing nonunion subcontractor and agreements not to do business in the future with a nonunion subcontractor. For example, if in addition to a "future" no-subcontracting agreement the Union was also seeking an immediate termination of the Employer's contract with Parsec, there would be a clear violation of Section 8(b)(4)(B).[(7)]

With respect to cease-doing-business agreements that apply only in the future, in Local 1976, Carpenters v. NLRB (Sand Door & Plywood Co.),[8] decided when no-subcontracting agreements were lawful under the Act prior to the enactment of Section 8(e), the Supreme Court wrote that Section 8(b)(4)(A) (which, as modified, later became Section 8(b)(4)(B)) prohibited only coercion of employers to cease doing business at the actual time of a boycott, not at the earlier time when such an agreement is entered into:

[I]t seems most probable that the freedom of choice for the employer contemplated by [Section] 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business choice. . . .

In Centilivre,[9] the Board stated that Congress intended to "retain the then existing law in connection with secondary boycotts" when it enacted Section 8(e), citing legislative history that specifically referenced Sand Door. Thus, the Board held in Centilivre that unions can lawfully picket in order to obtain a no-subcontracting agreement that is privileged under the proviso in Section 8(e), but violate Section 8(b)(4)(B) where the agreement would apply to ongoing as well as to future business relationships.[10]

Subsequently, in Los Angeles Bldg. and Constr. Trades Council (B & J Investment Co.),[11] the Board held that "coercion exerted upon [an employer] to force it to execute an agreement containing a subcontracting clause is not coercion compelling [the employer] to cease doing business with the nonunion subcontractors" within the meaning of Section 8(b)(4)(B), citing to Sand Door. Moreover, the Board will not infer an unlawful object where the union abandons its efforts to convince the neutral to cease doing business with an existing nonunion subcontract,[12] or due to the mere presence of an identified and existing nonunion subcontractor.[13]

Although the foregoing cases hold that unions do not violate Section 8(b)(4)(B) by picketing to obtain cease-doing-business agreements that are privileged by the construction industry proviso, there is no principled reason why similar results should not obtain where a union pickets to obtain a cease-doing-business agreement that is privileged under the Act for other reasons. As noted above, Congress did not intend to prohibit unions and non-statutory Employers from entering into cease-doing-business agreements.[14] Consequently, such agreements are privileged under the Act and unions may picket to obtain them, at least so long as they do not include a cessation of ongoing business relationships.

For these reasons we conclude that, absent withdrawal, the Region should dismiss the instant Section 8(b)(4)(B) charge against the Union.

B.J.K.

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[1] 45 U.S.C. Section 151 et seq.

[2] The Employer contracts with other Section 2(2) employers, some of which are signatory to Union contracts, to perform non-construction work at its Seattle hub.

[3] Burlington Northern and Santa Fe Railway Co. v. Teamsters, Local 174, No. C97-1052 (W.D. Wash. filed Jun. 26, 1997).

[4] The Union did not violate Sections 8(b)(4)(A) and 8(e) because the Employer is not a statutory employer under Section 2(2). Consequently, we agree with the Region's determination that the Employer's Section 8(b)(4)(A) charge should also be dismissed, absent withdrawal.

[5] Teamsters (Korean Air Lines), 290 NLRB 184, 191 (1988) ("The NLRB can assert jurisdiction and find a violation of the secondary boycott provisions of the NLRA when the primary is an employer within the meaning of the NLRA, but when the secondary is either a railroad or an airline" covered by the RLA). See also Local 25, Teamsters v. New York, New Haven and Hartford R.R. Co., 350 U.S. 155, 160 (1956) ("since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by [Section] 8(b)(4)(A)," now codified in Section 8(b)(4)(B)).

[6] See NLRB v. Plumbers, Local 638 [Austin Co.], 429 U.S. 507, 520 (1977), quoting National Woodwork Mfrs. Assoc. v. NLRB, 386 U.S. 612, 644-45 (1967), (the "touchstone" for determining whether conduct is secondary is "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees"). Cf. Local 32B-32J, Service Employees (Nevins Realty Corp.), 313 NLRB 392, 399-400 (1993), enf'd in pertinent part, 68 F.3d 490, 495 (D.C. Cir. 1995), where the Board affirmed the ALJ's rejection of the

union's argument that an otherwise neutral contracting party becomes a primary employer for purposes of Section 8(b)(4), with respect to the subcontractor's employees, because the contracting employer controls the award of subcontracts, terming the argument a "distortion of the 'right to control' test."

[7] See, e.g., Local 399, IBEW (Illinois Bell Tel. Co.), 235 NLRB 555, 559 (1978), enf'd, 601 F.2d 593 (7th Cir. 1979) (picketing of contracting non-statutory employer by union representing employees of terminated subcontractor violated Section 8(b)(4)(B) where union's intent was to convince the contracting employer to stop leasing equipment from former subcontractor).

[8] 357 U.S. 93, 105 (1958).

[9] Northeastern Indiana Bldg. and Constr. Trades Council (Centilivre Village Apartments), 148 NLRB 854, 857 n.17 (1964).

[10] Id. at 857-58.

[11] 214 NLRB 562, 563 (1974).

[12] Los Angeles Bldg. and Constr. Trades Council (Gasket Mfg. Co.), 175 NLRB 242, 243 (1969) (union ceased attempts to obtain termination of existing nonunion subcontractor and instead granted it a waiver to continue to perform its current project).

[13] Los Angeles Bldg. and Constr. Trades Council (Church's Fried Chicken, Inc.),183 NLRB 1032 (1970).

[14] We further note that Congress also saw fit not to proscribe secondary activity at all in the Railway Labor Act. See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 391 (1969); Korean Air Lines, 290 NLRB at 190.